In the Supreme Court of the United States

OCTOBER TERM, 1953

No. 464

UNITED STATES OF AMERICA, APPELLANT

v.

THE BORDEN COMPANY, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS

REPLY BRIEF FOR THE UNITED STATES

Appellees have significantly failed to meet head-on the principal issues upon which the court below ruled and which are discussed in our main brief.[1] Thus, they treat the issue of whether the Eggleston deposition was properly unsealed, and therefore available for use, rather cursorily as a subsidiary point; they do not even urge that the

[1] In this reply references to appellees' brief are intended to include only the brief filed by Borden, Belmont, Bowman, and Ridgeview. Appellee Beloit has filed a separate brief which will be specifically named when reference is made to it. References to the respective briefs will appear as "Br." and as "Beloit Br."

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tape recordings were privileged as a lawyer's work product; and they rely not at all on the Illinois dead man's statute. They seek to support the court's refusal to enjoin the Clayton Act violations not on the basis of the injunction in the *Dean* case, but on the theory that apart from it the Government did not make out a case for injunctive relief. But although they have avoided the grounds followed by the court below in supporting its rulings, appellees have ranged far and wide to find other bases justifying the result. That is what makes this brief necessary.

1. THE EGGLESTON DEPOSITION

The basic issue on this point is whether the removal of the seal which had been placed on the deposition made it available for appropriate use at the trial. Once that issue has been passed, we can turn to the secondary questions of whether the use to which the Government proposed to put it was proper, and whether the refusal of the court to permit its use hurt the Government's case. Yet appellees hardly touch on the merits of the controversy, treating it merely as subpoint 5 of Point I A. (Br. 30–31.) But on even so brief a presentation appellees were unable to avoid passing reference to the fact that Judge Igoe, under whose order the deposition had been retained under seal, has himself later found that the unsealing of the deposition was "justified". (Br. 32; R. 137.) This unsealing admittedly occurred be-

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re the Government attempted to use the deposi-
on at the trial; the deposition was unsealed on
arch 5, 1953, while the ruling complained of
curred on March 6, 1953. (R. 129, 185–189;
r. 10.) As appellees concede (Br. 10, 31), and
Judge Igoe himself found (R. 137), the unseal-
g was performed by counsel for the plaintiff
the *Dean* case, in connection with which the
eposition had been taken, under Rule 14 of the
ules of the District Court for the Northern Dis-
ict of Illinois.

Appellees' only answer to this obvious proposi-
on is to imply that there was something im-
roper about the means adopted by the Govern-
ent to obtain the deposition from the Clerk of
ne Court (Br. 10–11). This suggestion is with-
ut merit. In order to obtain and use a sealed
eposition, two steps must first be taken: (a)
ne person seeking possession of the deposition
ust obtain an order permitting its withdrawal
rom the court and (b) the deposition must be
nsealed by court order or by direction of any
f the parties. (See Rule 14 quoted in Appel-
ees' Brief, p. 10, note 5.) These steps need not
e taken in this sequence. On January 23, 1953,
he Government obtained an order permitting the
ithdrawal of the Eggleston deposition (R. 133).
Thereafter, on January 28, 1953, it moved before
Judge Igoe, who sat in the *Dean* case, to unseal
he deposition (Appellees' Brief, appendix, p.
9). Judge Igoe issued an order refusing to un-

seal the Eggleston deposition on February 10, 1953 (R. 159–161). However, this order by Judge Igoe did not rescind or supersede the withdrawal order obtained by the Government on January 23, 1953, although, admittedly, that order could not help the Government if the deposition remained sealed. On March 5, 1953, McConnell, counsel for the plaintiff in the *Dean* case, caused the deposition to be unsealed (R. 135). It was at this point that the Government, under authority of the still outstanding withdrawal order of January 23, 1953, obtained the unsealed Eggleston deposition (R. 129, 132, 133).

Thus the question raised by appellees resolves itself into whether the Government properly used the old withdrawal order, or should have sought a new one. This question, after the seal had been removed, is entirely a matter of form. The Government clearly was not guilty of any improper procedure in the matter.

Appellees also argue that the Government invited error by reason of the fact that it postponed a decision by Judge Igoe on the issue of resealing the depositions until after the trial (Br. 32). The difficulty with this proposition is that the ruling objected to came on March 6, while the defendants' motion before Judge Igoe was not made until March 9 (Br. 11). At that time the Government had totally failed in its attempt to persuade the court below to allow it to use the

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deposition, the error had been committed, and the Government had everything to gain and nothing to lose by putting the matter up to Judge Igoe.

Actually, there is little at issue between the parties as to whether the deposition was available for a proper use on March 6, although appellees attempt to disguise this fact under a multitude of arguments as to why it should not have been accepted for the specific use proposed. Appellees argue first that, if the Government wished to impeach Eggleston, there were a number of other sources to prove he was contradicting himself, such as his testimony before the grand jury, a nine-page affidavit he had given to his attorney, or oral statements made to Government attorneys (Br. 21). We do not know on what basis appellees assume that the secret grand jury testimony would have impeached the witness, but, in any event, the resulting indictment was still pending, and, even pretermitting the propriety of using the grand jury testimony, the Government may well have had sound reasons of policy for not doing so. As we pointed out in our main brief (p. 38), the affidavit was a generalized statement which was not sufficient to serve the same purpose as the deposition. And the introduction of evidence of the oral statements to the Government attorneys, assuming that they provided material for impeachment, would only result in pitting one man's word

against another. We submit that the Government was entitled to choose the material which it believed would be most effective for impeachment.

In our main brief we pointed up the importance of the exclusion of the deposition by referring to the court's own comments that it could not accept as accurate the deposition of another Government witness, Heinz, which conflicted with Eggleston's testimony, for the reason that the latter was "over all, a truthful witness" (R. 118). Appellees seek to depreciate this argument by quoting a selected portion of the court's findings which would indicate that Heinz's statement dealt only with "meetings which took place over twelve years ago between two of ten alleged conspirators" (Br. 23). While it is true that Heinz's testimony did deal in part with conversations in the early forties about sharing business, Heinz, who was manager of Bowman's Evanston Branch until 1945 (R. 358), also testified as to the sharing with Borden of the milk business of the Great Lakes Naval Training Center and Fort Sheridan during World War II (R. 361–363), and the fact that he was under standing instructions that Borden and Beloit were to be considered "closed competition" (R. 364–365). Indeed, the court stated, "Portions of Heinz's testimony, if true, would tend to prove the existence of the conspiracy alleged in the complaint" (Finding 18, R. 118). Nor can the appellees succeed in at-

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tributing to other causes the court's action in disregarding this testimony.[2] The court itself was specific in stating both in its memorandum opinion (R. 95) and in its findings of fact (R. 118) that its final judgment was made as a result of choosing between Eggleston, whom the court believed to be "over all, a truthful witness," and Heinz, whom the court had not seen.

After disposing of Mr. Heinz, appellees purport to find that the Government could not be harmed by the exclusion of the Eggleston deposition since (a) its introduction could only serve to impeach Eggleston's testimony and (b) it was really not inconsistent in any event (Br. 26–28). On the first part of this argument, appellees totally disregard the fact that, had the Government been permitted to call the facts in the deposition to Eggleston's attention, his recollection might have been refreshed and his testimony might have been far more helpful to the Government's affirmative case. On the second part, this is hardly the time or place to argue away apparent inconsistencies in the two statements. Maybe Eggleston could have wriggled off of some of the limbs he had crawled out on; maybe not. The

[2] An examination of the portions of the deposition which appear in the printed record (R. 356–368) indicates that the witness was cautions in attaching specific dates to events which occurred ten years or more before; and that he misspoke himself as to a date in 1945 (R. 366); but that there was no such uncertainty as to lead the court to disregard his testimony.

Government should have been given the opportunity of examining him on the prior statement; if it had then failed to impeach him, that was a risk it was entitled to take.

Finally, as a last resort, appellees retreat to the position that permission to introduce a prior contradictory statement of a party's own witness on the basis of surprise is a discretionary matter with the trial court, a determination on which he should not be reversed on appeal (Br. 33–34). We take no issue with the proposition that the decision to permit impeachment of a party's own witness is essentially a matter for the judgment of the trial court. But in this case the court had already determined that the Government should be permitted to impeach its own witness (R. 177–178). The only question remaining, therefore, was whether the particular prior contradictory statements, contained in the deposition, were properly available to the Government to carry out that purpose. The court did not deny the Government the right to use the deposition on discretionary grounds and appellees cannot hide behind the non-reviewability of an exercise of discretion on this appeal. The issue is squarely whether the Government was entitled to confront its own witness with a contradictory deposition which had been given in a separate case and which, although previously protected by seal, was then unsealed pursuant to the rules of the court

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in question. We contend the court was in error in refusing to permit that use of the deposition and that the error grievously impaired the Government's case.

2. THE NEWEY TAPE RECORDINGS

Appellees' major argument is not that the tape recordings were privileged as work-product, but that the Government did not offer them in evidence (Br. 36–39), and failed to make a formal offer of proof with respect to them (Br. 43–44). Neither contention is valid.

(a) It is undisputed that up to the time McConnell released the recordings to Newey, neither the Government nor any other party to this litigation had physical possession of them (Br. 13). Indeed, on the second day of trial, when the Government attempted to subpoena the recordings from McConnell, the court ruled that they were McConnell's work-product and denied the Government the right to subpoena them (R. 165–167). However, as soon as possession had been obtained, Government counsel appeared before Judge Campbell and stated:

> Mr. JINKINSON. Getting back to the Newey proposition, I have subpoenaed Mr. Newey, and in order to refresh his memory, I sent him over to Mr. McConnell's office to see some tapes that he had, that Mr. McConnell had in court here one day. Mr. Newey has the tapes in his possession.

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> It is a question of whether or not this court is going to hear those tapes, and if the Court is going to hear them the Government, of course, would like to have permission from the court to set up in the court room the necessary equipment so that the tapes can be played. [R. 368.]

This, we submit, was in effect an offer of the tapes in evidence. It was so treated by the trial court, which rejected the offer, stating:

> I take it that the witness Newey will refresh himself from those [tapes], if he cares to, or if he needs to, and as far as playing them here, the ruling made at the time Mr. McConnell asked for it still stands.
>
> There is no use of producing the tape recordings here. * * * [R. 369.]

The court's reference to its earlier ruling, namely its refusal to subpoena the recordings on the ground that they were privileged as a lawyer's work product, indicates that the decision was made on the merits. Obviously the court was not concerned with the form of the offer or the question of whether to listen to the recordings or read the transcript. Certainly after this categorical rejection, a further offer would have been futile. Thus appellees' contention that the Government "never offered" the recordings in evidence is without merit.[3]

[3] The fact that the transcripts of the tape recordings were never separately offered in evidence is of no significance.

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Appellees' further contention, that the Government took a position inconsistent with an offer of the recordings in evidence when it refused to allow the appellees to inspect the recordings (Br. 37), is a distortion of the Government's correct legal position. After the court had rejected the offer of the recordings and stated that Newey could, however, use them to refresh his recollection prior to his assuming the witness stand (R. 369), appellees' counsel demanded that they be given an opportunity to inspect the records (R. 370). The Government objected and the court sustained the objection, pointing out that material used to refresh recollection outside the courtroom is not available for inspection by adverse counsel (*ibid.*). The important factor is that this exchange took place after the court had rejected the recordings and is, therefore, in nowise inconsistent with the earlier offer of them in evidence.

(b) Appellees' final contention, that failure of the Government to make a formal offer of proof of the contents of the recordings leaves this Court without sufficient knowledge of their

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for, as appellees concede, the transcripts were covered by Judge Campbell's original work-product ruling (Br. 36), and his refusal to permit the playing of the recordings for the reason that they were still privileged as work-product (R. 368–369) similarly would have led to his rejection of the transcript. Moreover, since the transcripts were only copies of the best evidence, the tapes, the Government was under no duty to offer the transcripts.

contents to discharge its review functions, is untenable.

The law is clear that a formal offer of proof is not essential to preserve the question of erroneous exclusion of evidence, if it is clear from the record as a whole what the nature of the excluded testimony was. *Hoffman* v. *Palmer*, 129 F. 2d 976, 994 (C. A. 2), affirmed, 318 U. S. 109; *Maguire* v. *Federal Crop Ins. Corp.*, 181 F. 2d 320, 321–322 (C. A. 5); *Meaney* v. *United States*, 112 F. 2d 538, 539 (C. A. 2).[4]

The record in this case clearly demonstrates the significance and nature of the excluded testimony. The tape recordings were taken by Newey and consisted of conversations between Newey and agents of five defendants in this case including Borden, who were alleged to be co-conspirators of the present appellees (R. 166, 373, 382, 387, 395).[5] Newey testified only after

[4] Appellees cite *Herencia* v. *Guzman*, 219 U. S. 44, 46, in support of their position, but that case merely holds that a judgment will not be set aside upon the ground of erroneous exclusion of evidence, if the record, as a whole, does not disclose what the nature or significance of the excluded testimony was.

[5] Appellees' statement that Newey failed to identify the Borden agent (Br. 12) is misleading. During Newey's direct testimony, he stated that he had conversations with Robert Mills of Borden (R. 382). On cross-examination, Newey was asked to describe the physical characteristics of each of the five agents, each of whom he had seen for limited periods of time, a few hours at most, in 1950 (R. 408–409). Newey was then asked whether he recognized any of these agents as

having refreshed his memory from copious notes made from a transcript of the recordings (R. 409–410), and during his testimony he refreshed his recollection from his notes and the transcript (R. 376). Indeed, the trial court found in its memorandum opinion that:

> Newey had little, if any, independent recollection of any of the conversations. After each question was asked, he read extensively from transcripts of the recordings and from personal notes based upon those transcripts. His answers were almost all based upon such an extensive reading. [R. 96.]

In light of this finding by the trial court, it is clear that Newey's direct testimony (R. 370–400) establishes the contents of the excluded recordings sufficiently to enable this Court to perform its limited review function of determining their relevancy and that no further offer of proof was necessary.

Appellees' argument that Newey was so shaken on cross-examination as to make his direct testimony suspect is beside the point. The trial court rejected the testimony not on this ground but because of his lack of independent recollection (R. 95–96). In these circumstances the court's rejection of the recordings was doubly prejudicial to the Government.

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being in the courtroom (R. 409). Newey stated he did not. Counsel for appellee Borden requested Mr. Mills to stand and Newey stated that he then recognized him (*ibid.*).

3. TESTIMONY EXCLUDED UNDER THE ILLINOIS "DEAD MAN'S" STATUTE

Appellees, in attempting to support the district court's exclusion of Moser's testimony as to his conversations with a deceased Borden official, do not rely at all on the Illinois "dead man's" statute upon which the court's ruling was based. They merely contend that, under applicable Illinois law, testimony as to conversations with a dead man is entitled to "little or no weight" (Br. 51). But such a rule, even assuming its applicability to the instant case, goes only to the weight to be given such evidence, and not to its admissibility. Plainly, it cannot now be used to justify exclusion of relevant evidence.

4. THE DISMISSAL OF THE PORTION OF THE COMPLAINT CHARGING VIOLATIONS OF THE CLAYTON ACT

Appellees, relying upon *United States* v. *W. T. Grant Co.*, 345 U. S. 629, argue that the district court dismissed the portion of the complaint which sought relief against violations of the Clayton Act because it "found no cognizable danger of current violation" thereof (Br. 55), and that the Government has not shown that the chancellor abused his discretion in so doing (Br. 54). They contend that the Government had shown only "some old violations" of the Act (*ibid.*), and that the record contains no evidence of violations by any of the appellees "during a period of sev-

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eral years preceding" the entry of the *Dean* decree (Br. 15).

In taking this position appellees are relying upon the very reasons which the district court specifically refused to adopt. It is clear that the district court did not base its dismissal upon any finding that the only violations were old ones, or that there was no cognizable danger of recurrence, but relied upon the existence of the *Dean* decree which, in the court's view, "effectively enjoined" appellees from further violations of the Clayton Act (R. 111; Fdg. 38, R. 123; Conclusion of Law 9, R. 124–125). Indeed, the district court denied a motion by appellees Bowman and Ridgeview to amend the findings so as to make the judgment rest on the remoteness of the violations and the unlikelihood of recurrence (R. 125, 150). The court refused to make the finding that "There is no substantial credible evidence tending to prove that either Bowman, Ridgeview, Borden, or Belmont has *in the past five years* performed any act violative of Section 2 (a) of the Clayton Act, as amended, which is not now prohibited by the [*Dean*] decree" (R. 126). [Emphasis added.][6]

[6] At the same time the court rejected the following proposed additional conclusion of law which, appellees asserted (R. 127), was based on the *Grant* case:

"Before exercising its power to grant injunctive relief, the Court must determine that there exists some cognizable

In short, Judge Campbell did not make any determination that the Government had not shown the need for injunctive relief, but rested his decision upon the erroneous view that existence of a private decree barred the Government from obtaining relief in its own suit. As we pointed out in our main brief (pp. 52–54), a private decree does not adequately protect the public against violations of the antitrust laws. In view of the serious violations of Section 2 (a) which the record shows,[7] we submit that the district court clearly erred in holding that the *Dean* decree required dismissal of the complaint in the instant case.

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danger of recurrent violations of law. Proof of past violations of the Clayton Act is not in itself sufficient to warrant the granting of injunctive relief if there is no significant threat of future violation."

[7] For example, from 1928 or 1929 to 1942, appellee Bowman gave the A. & P. stores a 5% discount on milk purchases (R. 291–292). After A. & P. informed Bowman in the Spring of 1942 that it was transferring its business (R. 292), Bowman offered A. & P. an 11% discount to hold the business (R. 296) and also paid A. & P. $50,000 to make up the difference between 5% and 11% for past years (R. 300, 303–304). Newey's testimony indicates that, as recently as 1951, appellee Borden was continuing to offer storekeepers gratuities in return for their business (R. 386).

Because of Judge Campbell's holding (R. 108, 121–122) that the Government had shown *prima facie* violations of the Clayton Act, and in light of the limited issues raised by the Government's appeal, the record before this Court contains only a small portion of the evidence relating to the Clayton Act violations.

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5. CONTENTIONS OF APPELLEE BELOIT

Appellee Beloit has filed a separate brief in which it contends that, no matter what the outcome of this appeal may be as to the other appellees, the trial court's judgment of dismissal as to it should be affirmed (Beloit, Br. 9). It argues that, in order to obtain a reversal of the judgment in its favor, the Government must show that the excluded evidence itself would have established Beloit's participation in the conspiracy.

The Government's burden is not that great. The district court held that the Government had failed to show the existence of *any* conspiracy, and we contend that it made that finding only because it had improperly excluded important elements of the Government's case. If that contention is correct, the case must be remanded for a new trial. The issue whether the Government's evidence will be sufficient to link Beloit to the conspiracy (assuming that the Government will be able to prove conspiracy on the new trial) is, we submit, for initial determination by the trial court in the light of all the facts developed in the new trial, and cannot now be determined by this Court *in vacuo*.

CONCLUSION

The judgment of the district court should be reversed, and the cause remanded for a new trial.

Respectfully submitted.

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